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No. 85-1229

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In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM S. RUSSELL, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the decisions of the Merit Systems Protection Board sustaining petitioners' removal for participating in a strike against the United States and for being absent without leave.

2. Whether the court of appeals correctly assessed attorney fees and costs of $500 jointly and severally against each petitioner and their counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I1-I8) is reported at 771 F.2d 493. The opinions of the Merit Systems Protection Board (separately paginated in Pet. App. H) are reported in the Merit Systems Protection Reporter.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1985. Petitioners' petition for rehearing was denied on October 17, 1985 (Pet. App. J1). The petition for

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[1] *Russell* v. *Department of Transportation*, 17 M.S.P.R. 210 (1983); *Houlihan* v. *Department of Transportation, FAA*, 17 M.S.P.R. 229 (1983); *Oswill* [and *Hetherington, et al.*] v. *Department of Transportation*, 17 M.S.P.R. 348 (1983); *Henry* v. *Department of Transportation, FAA*, 19 M.S.P.R. 70 (1984). The decisions of the Board's presiding officials in these cases (separately paginated in Pet. App. G) are unreported.

a writ of certiorari was filed on January 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge their removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and the subsequent litigation are set forth in our Brief in Opposition in *Campbell* v. *Department of Transportation, FAA*, No. 84-78, in response to one of a number of other petitions arising out of the strike.[2]

1. Petitioners were removed from their positions as air traffic controllers on the grounds that they participated in a strike against the United States and were absent without leave during the strike. They appealed to the Merit Systems Protection Board (MSPB or Board), where they were afforded a hearing. The agency established a prima facie case of strike participation by demonstrating that petitioners were absent without leave during a strike of general knowledge.[3] Petitioners contended before the Board that they did not voluntarily participate in the strike, but rather were absent under duress.

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[2]A copy of our response in *Campbell* has been sent to counsel for petitioners.

[3]The standard applied below requires that the agency at all times bear the burden of persuasion with respect to strike participation; the agency must show by a preponderance of the evidence that the employee withheld his services in concert with others. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482-483 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). Once the agency has made a prima facie showing by evidence of the employee's unauthorized and unexplained absence during a strike of general knowledge, "the burden of going foward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing." 735 F.2d at 482.

a. Petitioner Russell had been scheduled for annual leave on August 2 and 3, 1981. His supervisor telephoned him early on August 3, the first day of the strike, and told him that his annual leave was cancelled. Russell responded by saying, " 'I think you know my position,' " and did not report for work on August 3 or thereafter. Pet. App. G14-G15 (Russell).[4] In response to the agency's notice proposing his removal, Russell claimed that he absented himself because he was a trainee and believed that the union would impede his professional advancement if he did not join its strike (*id.* at G15-G16).[5] Russell admitted that no threats were made to him personally, however. The record contains no direct evidence to support his allegations; Russell did not testify in his own behalf at the Board hearing (*id.* at G17-G18). Rather, he submitted the testimony of his psychiatrist, who said simply that Russell was generally "fearful" about his future as an air traffic controller; the psychiatrist also testified that Russell was unable to make a decision about whether to participate in the strike, and that Russell had never mentioned any fear of physical or personal harm (*id.* at G18-G20).

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[4]All of the presiding officials' decisions are contained in Appendix G to the petition; since this portion of the appendix is not consecutively numbered, our citations will refer to page numbers within the decision indicated—*e.g.*, "Pet. App. G15 (Russell)."

[5]It was not until Russell appealed to the court of appeals that he alleged that he was also concerned about his safety (see Pet. App. I2). The only record evidence cited in support of this claim was his written response to the agency's proposal to remove him, which was devoted almost exclusively to his claim that he feared damage to his career. The only reference to a fear of physical harm was his assertion that, after June 1981 but before the August 1981 strike, " '[t]hreats both physical and career oriented were made to scabs and those who were not supportive of the strike.' " See Resp. Statement in Lieu of Br. 6-7.

b. Petitioner Hetherington was removed for striking on August 4 and 5, 1981 (Pet. App. G37 (Hetherington)). On August 3, 1981, his day off, Hetherington received a telegram from the FAA advising him that a strike was in progress and that he should report for duty; he did not (*id.* at G38). When Hetherington responded to the agency's notice proposing his removal, he claimed that he was confused and/or coerced (*id.* at G37-G38). No specifics of the coercion defense were provided, however: Hetherington elected not to testify, and proffered only the hearsay testimony of individuals who stated that he had told them that he was apprehensive and fearful regarding the strike (*id.* at G38-G39).

c. Petitioner Henry was charged with strike participation beginning on the first day of the strike, August 3, 1981, and continuing through the date of his notice of proposed removal, August 6, 1981 (Pet. App. G18-G19 (Henry)). Henry also alleged that he acted under duress in being absent without leave during the strike, but he too elected not to testify to this effect (*id.* at G20-G21, G27). Instead, his counsel contended that Henry was fearful and that his fears were based upon an alleged incident in which two union members threatened him and one grabbed him around the neck (*id.* at G21-G23). However, another air traffic controller who was present during the incident testified that one of the pro-strike controllers may have pushed or jabbed Henry on the shoulder only to make a point (*id.* at G23-G24). (This controller also testified that he experienced the same pressures but decided not to participate in the strike because he had too much to lose (*id.* at G24).) Henry's supervisor, who witnessed the incident as well, testified that no physical contact was made (*id.* at G25). The agency official charged with deciding whether to remove Henry investigated the incident and found that the two (non-threatening) controllers present remembered the discussion, but did not recall any physical or violent contact

(*id.* at G21-G22). He testified that he had received no reports of threats or violence at Henry's facility (*id.* at G21).

d. Petitioner Houlihan was charged with striking beginning on the first day of the strike, August 3, 1981 (Pet. App. G15-G16 (Houlihan)). He responded to the agency's charges by claiming that he feared he would not progress as a trainee controller if he did not participate in the strike (*id.* at G16-G18). Houlihan also alleged that he feared for his personal safety (*id.* at G19). He admitted he had not received any threats directed toward him, but claimed he had heard rumors of threats to other controllers (*id.* at G19-G20).[6] He admitted participating in picketing (*id.* at G20).

e. Petitioner Oswill was removed for striking on August 6, 1981 (Pet. App. G29 (Oswill)). He admitted in his response to the agency's notice of proposed removal that he deliberately took disqualifying medication on August 3 and 4 so that he would be disqualified from working his scheduled shifts on the first two days of the strike (*id.* at G33-G34). Nevertheless, his supervisor arranged for transportation so that he could come to work and allowed Oswill to sleep on duty on those days (*id.* at G35). On August 5, Oswill called to request sick leave, was told that only his supervisor could approve sick leave, and then never contacted his supervisor. Instead, Oswill went to the union headquarters that day and appeared at the picket line (*ibid.*). He did not report for his next regularly scheduled shift on August 6 (*id.* at G29-G30). Oswill contended before the Board that his unauthorized absence during the strike was the result of duress. He claimed that he had previously been subjected to verbal abuse and social ostracism and that

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[6]While Houlihan contended that a strike supporter threatened to shoot anyone who returned to work during the strike, he also admitted on cross-examination that this statement was made after the strike began, that he had already begun to withhold his services, and that the threat was impersonal and indirect (Pet. App. G20 (Houlihan)).

he and his wife had received threatening telephone calls (*id.* at G32).

2. a. The Board's presiding officials rejected the coercion claim of each petitioner.

Each decision noted that the legal standards to be applied to claims of coerced participation in a strike against the government were set forth by the Board in *Johnson* v. *Department of Transportation, FAA*, 13 M.S.P.R. 652 (1982), aff'd, 735 F.2d 510 (Fed. Cir. 1984). In *Johnson*, the MSPB adopted and the court of appeals approved a "reasonable man" standard for establishing involuntary participation in a strike. The Board found (13 M.S.P.R. at 660 (footnotes omitted)):

> [I]n order for a Federal employee charged with participation in a strike against the Government to establish a defense of coercion or duress, he must demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist.

Under this standard, "menacing tones or language, fear of 'financial ruin' or jeopardy to career advancement, exuberant moral suasion, or any vexation, annoyance or pressure resulting in a state of mental perturbation, reluctance to act or a choice of inherently unpleasant situations, may not suffice to render involuntary" an individual's participation in a strike (*id.* at 658-659 (footnotes omitted)).

The presiding officials then concluded that none of the petitioners offered evidence of threats or other intimidating conduct directed toward him sufficient to meet the *Johnson* standard (Pet. App. G21-G22 (Russell), G35-G36 (Oswill),

G37-G39 (Hetherington), G27-G29 (Henry), G21-G23 (Houlihan)). Because petitioners failed to come forward with convincing evidence that their unauthorized absences were for reasons other than strike participation, the presiding officials found that the agency had proved the charges against petitioners by a preponderance of the evidence (see page 2 note 3, *supra*). On petitions for review filed by both parties, the full Board (decisions separately paginated in Pet. App. H) affirmed the decisions of the presiding officials to the extent they sustained petitioners' removals.[7]

b. Petitioners then sought review in the United States Court of Appeals for the Federal Circuit. The petitions were among approximately 3,500 similar petitions filed by discharged air traffic controllers. All but nine cases were stayed pending the court's decisions in those "lead cases." On May 18, 1984, a five-judge panel of the court of appeals issued 11 decisions sustaining the removals of all but one of the petitioners in the lead cases.

A number of the unsuccessful petitioners filed petitions for a writ of certiorari; all were denied. See, *e.g.*, *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984); *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, No. 84-259 (Nov. 13, 1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, No. 84-78 (Oct. 9, 1984). After this Court denied the petitions in the lead cases, the court of appeals lifted the stay of the other pending appeals.

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[7]The agency petitioned for review by the full Board of the presiding officials' decisions that petitioners Russell, Henry, and Houlihan were constructively suspended (and thus entitled to back pay) between the agency's notice proposing their removals and the agency's decision to remove them. On this issue, the full Board reversed and no further review was sought.

3. In one of the early decisions issued by the court of appeals after the stay was lifted, the court affirmed the decisions of the Board with respect to these petitioners (Pet. App. I1-I8).

The court of appeals noted, regarding petitioner Russell, that claims of duress relating to career advancement were rejected in its lead decisions in *Johnson* v. *Department of Transportation, FAA, supra*, and *Martel* v. *Department of Transportation, FAA*, 735 F.2d 504 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984).[8] It pointed out that Russell had earlier admitted that no specific threats were made to him; that he did not argue that he was threatened with physical harm until his appeal; that he admitted picketing; that his psychiatrist testified Russell never mentioned

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[8]The petitioner in *Martel* had argued inter alia that his participation in the strike should be excused because he acted in the belief that he would experience on-the-job harassment from pro-strike controllers who could eventually ensure that he was suspended or removed from his position (735 F.2d at 509). The court rejected petitioner's contention that the Board's *Johnson* decision foreclosed the duress defense except where there were threats of *physical* harm. The court indicated, however, that it was only in "exceptional circumstances" that it "may" be possible to prove that strike participation was involuntary when the threats of harm were of a nonphysical nature (*id.* at 509 n.9), and that the proof of such threats must be "especially strong" since " '[s]triking against the government is a grave offense * * * and a criminal offense * * * [that] disrupts the functioning of the government itself' " (*id.* at 509 (quoting *Schapansky*, 735 F.2d at 484)). It noted that "[t]he goals of the strikers were 'to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety' " (*ibid.*). The court concluded (*ibid.*):

> Certainly, [petitioner's] vague and speculative worries of future job harassment, leading to possible job suspension or removal, fall far short of the type of objective evidence which would suffice. A person of ordinary firmness would reasonably be expected to resist such fears, rather than join an illegal strike for which the law provides criminal penalties.

fear from physical harm; and that his argument that subjective, even if unreasonable, fear should rebut the government's prima facie case would leave nothing of the *Johnson* "reasonable man" test. Pet. App. I2-I3. With respect to petitioner Hetherington, the court of appeals found that he had not met the standard of proof required by *Johnson* because his claim of coercion "lacks specifics and is fully met by the board's opinion" (*id.* at I3-I4). Regarding petitioner Henry's claims of coercion through fear of career damage and physical harm, the court noted that at his facility there were no reports of picketing, violence, or threats to any fellow controllers, and that the Board's opinion "citing, *inter alia*, *Schapansky* and *Johnson, supra*, provides ample support for * * * removal" (*id.* at I4-I5). The similar claim of petitioner Houlihan, who "did not receive any personal threats," was also held "properly rejected" (*id.* at I5). The court sustained the Board's finding that petitioner Oswill's alleged fear was unreasonable, in light of evidence diminishing his credibility (*id.* at I5-I6).

The court of appeals found "incredibl[e]" the fact that petitioners' counsel relied upon the court's decisions in the lead cases for his contention that the government was required to show "specific intent" as an element of its prima facie case. The court pointed out that the decisions upon which petitioners' counsel relied expressly stated that proof of general intent to strike was sufficient. Pet. App. I7-I8.

Finally, the court below concluded that, because "the arguments of petitioners are adequately met by precedents of lead cases and/or are patently frivolous," costs and attorney fees of $500 would be assessed, jointly and severally, against petitioner and counsel on each appeal (Pet. App. I8).

ARGUMENT

The decision of the court of appeals in this factbound dispute is correct, does not conflict with the decisions of this Court or any other court of appeals, and does not merit further review. The evidentiary standard that petitioners challenge is mandated by the nature of their conduct and supported by settled precedent, and the assessment of $500 by the court of appeals is amply justified.

1. Petitioners' contention (Pet. 24-27) that the court below applied an improper standard of proof for establishing involuntary strike participation is insubstantial. The standard requires that an individual who claims that his strike participation was involuntary demonstrate that his fears and concerns were reasonable and that they were such that a person of ordinary firmness would not be expected to resist them. This standard is consistent with established precedent and is the product of the considered judgment of this Court and, now, the tribunals deemed by Congress to have the expertise necessary to hear and decide the appeals of federal employees against whom adverse personnel actions have been taken.[9]

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[9]The decisions of this Court and the old Court of Claims have consistently applied an objective standard for duress in similar cases. In a case involving a claim that dangerous conditions were believed to exist at a workplace so as to provide a limited exception to the no-strike obligation of private sector employees, this Court endorsed the objective test, holding that "[i]f the courts require no objective evidence that such [dangerous] conditions actually obtain, they face a wholly speculative inquiry into the motives of the workers." *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 385-387 (1974). Cf. *United States* v. *Huckabee*, 83 U.S. (16 Wall.) 414, 432 (1872). The Court of Claims, one of the Federal Circuit's predecessors, also applied an objective standard for proving duress. See, *e.g.*, *Christie* v. *United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Leone* v. *United States*, 204 Ct. Cl. 334, 339 (1974); *McGucken* v. *United States*, 407 F.2d 1349, 1351 (Ct. Cl.), cert. denied, 396 U.S. 894 (1969). Petitioners do not assert that any court of appeals has used a different standard. See *United States* v.

The standard represents, in any event, a proper allocation of the burden of proof between the parties in view of the disruptiveness of petitioners' actions and the information available to each party to the proceeding. It is hard to overstate the disruption caused by petitioners' strike participation. It is reflected by the fact that a federal employee who engages in a strike violates the oath signed as a condition of his employment (5 U.S.C. 3333(a)) and commits a criminal offense punishable by imprisonment for up to one year (18 U.S.C. 1918). The reason for the oath and the criminal statute are not difficult to discern, and are particularly appropriate here given the sensitive nature of petitioners' positions. By definition, a strike disrupts the functioning of the government itself. Moreover, the "intentional goals" of the striking air traffic controllers "were to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety." *Schapansky*, 735 F.2d at 484 (citing *PATCO* v. *Federal Labor Relations Authority*, 685 F.2d 547, 622 (D.C. Cir. 1982) (MacKinnon, J., concurring)).

It is not disputed that petitioners participated in the strike (see Pet. 7). They insist, however, that they should be excused if they were afraid to refrain from striking—no matter how unreasonable their fear and no matter how little objective evidence of intimidation they present. But the virtual impossibility of disproving a mental state[10] means that the standard petitioners demand would ensure that federal employees would almost never be removed for

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Thompson, 749 F.2d 189, 194 (5th Cir. 1984); *Illinois* v. *Board of Educ.*, 606 F. Supp. 385, 390 (N.D. Ill. 1985); *Onnen* v. *United States*, 524 F. Supp. 1079, 1085 (D. Neb. 1981).

[10]To sustain an employee's removal for misconduct, a federal agency must prove its charges by a preponderance of the evidence (5 U.S.C. 7701(c)(1)(B)).

strike participation. In light of the widespread disruption (and danger) caused by strike participation—voluntary or involuntary—this is an unworkable demand.

2. Petitioners also assert that the court of appeals erred in imposing sanctions against them because their claims were not frivolous, and that the imposition of sanctions here creates constitutional problems and will "chill" the zealous advocacy of counsel. These contentions are without merit.[11]

a. This Court should not entertain petitioners' fact-bound contention (Pet. 16-21) that the court of appeals erred in determining that their appeals were frivolous.[12] Petitioners are simply wrong in insisting that they presented

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[11]On March 10, 1986, this Court denied a petition for a writ of certiorari making a similar challenge to an assessment under Fed. R. App. P. 38. *Robinson* v. *Department of Transportation, FAA*, No. 85-951. Presumably, the court of appeals' assessment here was also under Fed. R. App. P. 38, although it could have been under 28 U.S.C. 1912 or 1927.

[12]Petitioners' cause is, of course, not aided by their insistence that they were confident they would succeed. Their contention (Pet. 20) that there is "not a shred of evidence" suggesting that they did not act in good faith is both irrelevant (Fed. R. App. P. 38 and 28 U.S.C. 1912 do not provide that sanctions can be imposed only upon a finding of bad faith) and inaccurate (petitioners knew or should have known that their appeal would be governed by the court of appeals' prior decisions). See *Bartel Dental Books Co.* v. *Mapleton House Books, Inc.*, No. 85-7754 (2d Cir. Mar. 12, 1986).

Nor can it be persuasively argued (Pet. 15) that, in deciding whether their appeals were frivolous, petitioners were entitled to rely on the court of appeals' decision to hold oral argument. The appeal had already been filed. In any event, Fed. R. App. P. 34(a) does not preclude oral argument in frivolous cases; it merely permits the court to decline to hear oral argument when an appeal is frivolous. A court may wish to hold oral argument although the case appears frivolous in order to offer counsel an opportunity to convince it otherwise.

Finally, asking for "substantial" relief cannot transform a frivolous claim into a nonfrivolous one (see Pet. 14, 20).

plausible evidence to the Board of direct threats to them.[13] It is therefore apparent that any objective review of the record in their cases would have demonstrated that they could not prevail in the face of the *Johnson* precedent. While it is true that the court of appeals in *Martel* suggested the possibility that non-physical intimidation might excuse

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[13]Petitioners' attempt (Pet. 6-7 n.4, 25-26 n.13) to support their contention is utterly unconvincing.

The petition makes no mention of petitioners Henry or Russell. The principal "threat" Henry received is discussed at pages 4-5, *supra*. Russell concedes (Pet. 4, 17 n.9) that he did not present any evidence of direct physical threats, and it is and was frivolous for him to contend that the testimony of his psychiatrist met the reasonable man standard (see page 2, *supra*).

Regarding petitioners Hetherington, Houlihan, and Oswill, the petition provides citations to excerpts from the record that were attached to their briefs below. A fair reading of those portions of the record shows that they do not support petitioners' claim.

Contrary to petitioner Hetherington's assertions, the evidence did not establish that he was coerced by a threat that his house would be blown up. Petitioner's friend testified at the hearing before the Board that he (the friend) jokingly spoke of "fragging" petitioner's house. Petitioner himself elected not to testify, so there is no evidence in the record of how seriously he took the remark or that his subsequent participation in the strike was precipitated by the remark. See also page 4, *supra*.

Petitioner Houlihan testified that he feared pro-strike controllers would jeopardize his career and that he was told that he would "be taken care of" if he worked during the strike. Petitioner was not the recipient of any direct threats of harm (see also page 5 note 6, *supra*). Indeed, he cites to that part of the record in which he testified that no direct threats were made. See also page 5, *supra*.

Petitioner Oswill's contention that he was directly threatened is also without support in the record. Petitioner bases his claim of intimidation on the fact that a mailbox was thrown through a window in his neighborhood—even though neither the mailbox nor the window was his own and he had absolutely no evidence or reason to believe that the incident was related to the strike or union activity. See also pages 5-6, *supra*.

strike participation, it noted at the same time that such a case would have to be "exceptional" and would require "especially strong" proof (735 F.2d at 509 & n.9). Under no circumstances could those criteria be met by the record in these cases: indeed, the court in *Martel* rejected allegations substantially identical to those made by the petitioners in these appeals.[14]

Petitioners also assert that the fact that the court of appeals' precedents mandated affirmance of the Board's decisions in their cases is not a sufficient ground upon which to impose sanctions for their appeal. This assertion must be placed in context. The approach adopted by the court of appeals for handling the literally thousands of appeals by air traffic controllers was specifically designed to decide common legal issues in the designated lead cases. This procedure benefitted both the parties and the court by establishing at the outset the legal criteria that would have to be met before a decision of the Board would be reversed. Counsel and litigants in the air traffic controller appeals were, as petitioners concede, warned on several occasions that they should not merely repeat arguments that had already been rejected by the court and that those who did so would be subject to sanctions.[15] In any event, this case does

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[14]As the court below explained (Pet. App. 17-18), petitioners' contention (Pet. 18-19) that they distinguished their cases from those before the court in the lead cases of *Schapansky* and *Letenyei* v. *Department of Transportation, FAA*, 735 F.2d 528 (Fed. Cir. 1984), was "incredibl[e]."

[15]Petitioners acknowledge (Pet. 13) that the court of appeals sent them three separate notices (collected in Pet. App. F) advising them of the consequences of filing and maintaining frivolous appeals and citing the court's precedents on the subject (*i.e.*, *Wright* v. *United States*, 728 F.2d 1459, 1460, cert. denied, No. 83-6869 (Oct. 1, 1984); *Beachboard* v. *United States*, 727 F.2d 1092, 1094-1095 (1984); *Connell* v. *Sears, Roebuck & Co.*, 722 F.2d 1542, 1553-1555 (1983); *Asberry* v. *United States Postal Service*, 692 F.2d 1378, 1382 (1982)). Moreover, in the

not involve an award made on the basis of a frontal attack on the court's precedents (conceding their applicability but asking that they be overruled, or for the express purpose of preserving the issue for this Court's review); rather, petitioners disingenuously denied the precedents' applicability and mischaracterized the record, forcing the court to review the record and cases with that handicap. In these circumstances, the court's imposition of modest sanctions was plainly permissible.

b. Petitioners contend (Pet. 21-24) that the standard employed to assess sanctions for taking frivolous appeals is impermissibly vague and chills zealous advocacy and litigants' First Amendment rights. Petitioners' argument suggests that no court can assess sanctions to compensate appellees or to protect its docket from the abuses inherent in frivolous appeals. Such a proposition is necessarily unsound. It is, moreover, especially unconvincing to assert that the standard applied to petitioners' cases was impermissibly vague. Their appeal was deemed frivolous because their cases were squarely governed by the decisions in the lead cases, and they had been repeatedly warned that an appeal under such circumstances would be subject to sanctions. Thus, even if it could be said that frivolous appeals generally are not easily identified, in this instance the court of appeals had announced in advance that an appeal such as petitioners' would be deemed frivolous. Therefore, petitioners' claim does not merit review by this Court.

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lead air traffic controller cases, the court twice (somewhat obliquely) warned counsel of its intention to impose sanctions where subsequent air traffic controller appeals were deemed frivolous in light of the lead case decisions. See *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488, 494, cert. denied, No. 84-258 (Nov. 13, 1984); *Moylan* v. *Department of Transportation, FAA*, 735 F.2d 524, 524 n.*, cert. denied, No. 84-258 (Nov. 13, 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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